

Lu (Migration) [2019] AATA 374 (25 January 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Xiyang Lu

CASE NUMBER: 1612785

HOME AFFAIRS REFERENCE(S): BCC2014/3521269

MEMBER: Scott Clarey

DATE: 25 January 2019

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211 of Schedule 2 to the Regulations; and
- cl.820.221(1) of Schedule 2 to the Regulations

1.

STATEMENT MADE ON 25 JANUARY 2019 AT 10:19AM

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine married relationship – credibility issues – movement records – valid marriage registration in China – opinion of friends and acquaintances about nature of relationship – longevity of relationship – decision under review remitted

2.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 359AA, 359A
Migration Regulations 1994 (Cth), rr 1.09A, 1.15A; Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 19 December 2014 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.820.211 because the delegate was not satisfied the visa applicant was the spouse of the sponsor.
4. The applicant appeared before the Tribunal on 30 April 2018 and on 25 May 2018 to give evidence and present arguments. The Tribunal also received oral evidence from Jeffrey Allan Byrne (sponsor), Ms Jennifer Coates and Ms Susan Muir. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
5. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the visa applicant (Mrs Lu) is the spouse of the sponsor (Mr Byrne) as defined in s.5F of the Act.
8. The Tribunal has carefully considered the documentary evidence on the Department's file (including a copy of the Department's decision record provided by the applicant) and the additional documentary evidence that has been submitted to the Tribunal. The Tribunal also had the benefit of hearing the oral evidence of Mrs Lu and Mr Byrne and the two witnesses.
9. The Tribunal highlights that the Departmental delegate's decision record (dated 9 August 2016) was based in part on a partial account of Mrs Lu's travel movement record into and out of Australia. In the opening sentence of the decision record, the delegate stated that Mrs Lu 'first arrived in Australia on 22/09/2009'. At the hearing on 30 April 2018 the Tribunal questioned Mrs Lu at length about her early travel history to Australia as the movement record did not accord with a statement the parties' submitted to the Department on 15 July 2015. Mrs Lu adamantly maintained that she had first travelled to Australia on two occasions prior to 2009, both with Mr Byrne, and gave detailed accounts of her time in the country. These trips in question took on extra significance in relation to the visa application as it was during this time that she claimed she was first introduced to Mr Byrne's friends and family as his wife. After the hearing the Tribunal undertook further investigation of Mrs Lu's travel history and was able to unearth another movement record for her that covered this earlier, pre-2009 travel to Australia. The Tribunal notes that this other record wholly corroborated Mrs Lu's oral evidence of her early travel movements into and out of Australia with Mr Byrne. The Tribunal understands that the issue was caused by two alternate spellings of Mrs Lu's

first name (Xi Ying and Xiying respectively) that caused the movement record to be split as if these were two different people. The Tribunal is satisfied that these two records both pertain to Mrs Lu and that, when taken together, provide a full and accurate record of her travel to Australia that corroborates her oral and written evidence. This issue was in large part the reason for the Tribunal holding its second hearing where this discovery was explained to Mrs Lu.

3. Relevant background

10. Mrs Lu is a 44-year-old Chinese national who has resided in Australia since 2014. She has declared no previous relationships or children. Her sponsor, Mr Byrne, is a 73-year-old Australian citizen by birth. He has declared one previous marriage (that ended in divorce 1998) and one (now adult) child from this previous relationship.
11. The parties claim to have met in 2001, while Mr Byrne was living and working in China for an extended period. Mrs Lu was a waitress at a restaurant that Mr Byrne frequented and the two became acquainted. The parties claim Mrs Lu moved in with Mr Byrne approximately six months later and he proposed marriage in 2003. The parties were legally married at a government registration centre in September 2005. In 2006 the parties claim to have travelled back to Mrs Lu's hometown and held a large wedding celebration.
12. The parties claim to have lived together in China until 2013, when Mr Byrne says he was informed that his Australian old age pension would be cut-off if he did not return to Australia. Mr Byrne subsequently returned to Australia on 29 June 2013 to attend to the pension issue and was effectively informed that he could not depart Australia again without having his pension payments stopped. The Tribunal notes that Mr Byrne has remained in Australia since arriving on 29 June 2013. After an extended period apart, Mrs Lu moved to Australia to live on 17 October 2014 (Mrs Lu's travel history were a particular focus of inquiry at the hearings and will be discussed below in greater detail). The parties claim to have first lived with Mr Byrne's sister in Doveton, and then in a share/boarding house in Dandenong, where the couple claim to still reside together.

4. Credibility issues

13. At the outset the Tribunal records that there were significant credibility issues arising from specific information provided by Mrs Lu and Mr Byrne.
14. During the hearing the Tribunal found Mrs Lu to be at times vague, hesitant and/or evasive when answering direct questions. She at times responded off point and/or did not give specific answers or information to the Tribunal. This included evidence relating to details of her travel history into and out of Australia and the reasons she provided to explain the extended period of geographic separation between the parties in 2013-14 when Mr Byrne had returned to Australia and Mrs Lu remained in China.
15. Both parties told the Tribunal that they had travelled back to Australia together on 22 March 2013 and departed together for China approximately three months later on 19 June 2013. At the hearing Mrs Lu stated that the primary purpose of this trip was to visit the dentist in Australia. The Tribunal accepts this. Both she and Mr Byrne stated that (following their return to China on 19 June 2013), Mr Byrne returned again to Australia on 29 June 2013 to attend to an unexpected issue relating to his Australian pension payments. Both Mrs Lu and Mr Byrne told the Tribunal that while in Australia, Mr Byrne was effectively informed that he could not depart Australia again without having his pension payments stopped. The Tribunal accepts this. The Tribunal notes that Mr Byrne has not departed Australia since arriving on 29 June 2013.

16. Mrs Lu gave oral evidence that once she became aware of Mr Byrne's predicament regarding his pension payments and his effective inability to travel back to China, the parties made a decision as a couple that Mrs Lu would move to Australia to live with Mr Byrne. Mrs Lu told the Tribunal that her next trip to Australia, following her return to China on 19 June 2013 (from the 'dentist trip' outlined above), was on 17 October 2014, approximately 15 months after Mr Byrne had departed China for the last time on 29 June 2013. The Tribunal notes that Mrs Lu has not departed Australia since arriving on 17 October 2014.

5. s.359AA

17. Discrepancies between the oral evidence provided by Mrs Lu and the information contained in her Departmental movement record were discussed with Mrs Lu at the hearing in accordance with s.359AA of the Act. The Tribunal informed Mrs Lu that it wished to put new information that it would consider to be the reason or part of the reason for affirming the decision under review. The Tribunal explained the relevance and the consequences of the information to Mrs Lu and invited her to respond to the information. Pursuant to s.359AA(1)(b)(iii), the Tribunal advised Mrs Lu that she may seek an adjournment to consult with her representative before responding to the information. The Tribunal adjourned twice for Mrs Lu to consult with her representative before she responded to the information. Following the second adjournment Mrs Lu indicated she understood the consequences if the Tribunal relied on the information in affirming the delegate's decision. She responded to the information orally.
18. The Tribunal put to Mrs Lu information contained in her Departmental movement record that indicated she had travelled to Australia during this 15 month period when she claimed to have remained in China. Specifically, according to her Departmental movement record, Mrs Lu arrived in Australia on 7 September 2013 and departed Australia on 5 December 2013, a trip of approximately three months duration. In response, Mrs Lu told the Tribunal that the information contained in her Departmental movement record was wrong and that the September-December 2013 trip did not occur. Mrs Lu stated categorically that after she departed Australia in June 2013 (the 'dentist' trip referred to above) she did not return to Australia again until 17 October 2014, a date that she specifically and accurately recalled. The Tribunal notes that at the hearing Mr Byrne was asked about Mrs Lu's Departmental movement record that detailed her September-December 2013 trip to Australia. Mr Byrne also stated categorically that this trip did not occur.
19. The Tribunal questioned Mrs Lu about why it took approximately 15 months for her to join her husband in Australia on a permanent basis, after they had realised that Mr Byrne was effectively not able to return to China due to the issue relating to his pension payments. The Tribunal notes that Mrs Lu's responses to questions relating to this issue were at times vague, evasive and contradictory. She eventually stated three reasons for why it took 15 months for her to join her husband in Australia on a permanent basis. First, she said that she could not readily leave her job as a waitress in a restaurant. She stated that if you were a good employee in China, especially in a restaurant, there is an expectation that you would continue to work until the owner has found and trained a suitable replacement. Mrs Lu stated that as an honorable person she complied with this expectation. When the Tribunal questioned why it would take such an extended period for this process to occur, Mrs Lu then said that it was because she did not want to rush her departure from China and that she needed some time to arrange her financial (and other) affairs before departing. She also stated that although she did not have financial hardships, this delay in departing was also due to the fact that she was looking for the best possible price for an airfare to Australia and did not want to overpay for her ticket. She said that in China even rich people look for the cheapest price and it took her some time to find a discounted airfare to travel to Australia, which she said she eventually found for RMB5000 (approximately \$1000). Mrs Lu emphasised that her desire to find a cheap airfare was a key reason for the delay. When Mr

Byrne was asked the same questions about this extended period of geographic separation, he too was evasive and at times became agitated when answering questions. He stated that he did not know why it took so long, that he thought the period of separation was shorter but he was not sure how long it was, and intimated that Mrs Lu may have wanted to save money before departing for Australia.

20. Following the hearing, on 28 May 2018 Mrs Lu and Mr Byrne submitted separate (but near identical) letters in response. The letters stated that upon reflection after the hearing the parties had realised that the September-December 2013 trip did in fact occur and that both parties had forgotten about the trip due to a 'lapse of memory'. Mrs Lu's letter in response stated (in full):

6. It is with the deepest regret that I have to inform you that I made a terrible error in answering a question during the resumed hearing on May 25. I was asked if I had returned to Australia in September 2013 and returned to China in December of that year. I said I had not and was sure in my mind I had not. However on returning home my husband and I checked my passport and found that I had in fact come back to Australia on September 7 and returned to China on December 5. I came back to Australia because I wanted to celebrate our eighth wedding anniversary together with my husband. The number eight is highly significant in Chinese culture so my employer (sic) allowed me the time off..This was an important time for us so it is exceedingly worrying that I did not remember. This was an honest lapse of memory and was not intended to mislead the tribunal in any way. I can only think that this happened because of the immense strain my husband and I have endured in recent months and over the past few years. I offer my most profound apologies and trust you may forgive this error, as serious as it is.

21. The Tribunal finds it hard to accept that the parties' failure to prior recollect the occurrence of this trip can be plausibly explained by simultaneous lapses in memory from both Mrs Lu and Mr Byrne. Given the parties claim to have specific and detailed memories of their contact during this time (including speaking via phone and Skype on a near daily basis), the Tribunal finds it hard to believe that neither party would be able to recollect (even when repeatedly and specifically prompted by the Tribunal) a three month long visit to Australia by Mrs Lu, during which the parties claim to have been reunited after several months apart. The Tribunal notes that, when asked, Mrs Lu was able to promptly and accurately recall precise details of other movements she had made into and out of Australia, including the exact date of her most recent arrival (on 17 October 2014).

7. s.359A

22. On 9 October 2018, pursuant to s.359A of the Act, the Tribunal wrote to Mrs Lu to give her clear particulars of new information that the Tribunal had received after the hearing that it considered would be the reason, or a part of the reason, for affirming the decision under review. The Tribunal's letter recapped that at the hearing on 25 May 2018, the Tribunal had questioned Mrs Lu at length about her travel movements into and out of Australia, with a particular focus on 2013-14, and the related question of how long she and her sponsor had lived apart while he was in Australia and she was in China. The letter noted the Tribunal's specific concern with the trip in September-December 2013 that her Departmental movement records indicate she made to Australia but which Mrs Lu denied had occurred.

23. The Tribunal informed Mrs Lu in the letter the particulars of new information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review were:

8. The Tribunal had obtained evidence from the Department, in the form of copies of incoming and outgoing passenger cards, that appeared to confirm that Mrs Lu did in fact travel to Australia on 7 September 2013 and depart Australia on 5 December 2013. In addition to the dates of travel, the passenger cards contained information including Mrs Lu's name, date of birth and passport number. This information was consistent with information on the Tribunal's and/or the

Department's file. Information contained in the passenger cards appeared to corroborate information contained in Mrs Lu's Departmental movement record that was put to her at the hearing. Specifically, this information appeared to contradict her claim at the hearing that she did not travel to Australia between September and December 2013 and that after she departed Australia on 19 June 2013 that she did not return again until 17 October 2014.

24. The Tribunal invited Mrs Lu to comment on the information within two weeks of the date of the Tribunal's letter. On 23 October, prior to the stated deadline, Mrs Lu and Mr Byrne re-submitted the separate (but near identical) letters that they had submitted to the Tribunal on 28 May 2018 that admitted that the September-December 2013 trip did in fact occur and blamed a lapse of memory for their failure to recollect it at the hearing (as discussed above).

9. Conclusion on credibility issues

25. The fact of the September-December 2013 trip occurring, which the Tribunal notes is now not in dispute, renders implausible at least two of the three already tenuous explanations for the 15 month gap between Mr Byrne leaving China and Mrs Lu joining him permanently in Australia. The Tribunal finds it implausible that if Mrs Lu was unable or unwilling to leave her waitressing job before a replacement could be found, that she could conceivably take three months leave to visit Australia and then return to China and resume her employment. The Tribunal also finds it implausible that if the delay to join her husband in Australia was in large part explicable by her desire to find a budget flight to Australia, that Mrs Lu would take a return trip to Australia in the interim period, before returning to China to presumably resume her search for a cheap one-way airfare. The Tribunal accepts that Mrs Lu needed some time to arrange her affairs (financial and otherwise) before moving to Australia, but does not accept that this satisfactorily explains the 15 month delay in her joining Mr Byrne in Australia on a permanent basis.
26. The Tribunal cannot be certain why there was a nearly 15 month gap between Mr Byrne leaving China and Mrs Lu joining him permanently in Australia, or why the parties may have chosen to be untruthful about it. Although the Tribunal finds various elements of the explanation for the nearly 15 month gap between Mr Byrne leaving China and Mrs Lu joining him permanently in Australia hard to reconcile, it is mindful of the fact that the visa application was submitted after Mrs Lu had arrived in Australia and the parties are claiming to be in a genuine spousal relationship at the time of this decision. The Tribunal places some negative weight on these explanations and their implausibility.

Whether the parties are in a spouse or de facto relationship

27. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen by birth.
28. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3) of the Regulations, which is extracted in the attachment to this decision. Each of the specific matters contained

in r.1.09A(3) of the Regulations are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

29. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. Mrs Lu presented with her application a copy of the marriage certificate showing the marriage was registered in Guangdong Province, China on 23 September 2005. There is nothing to suggest that the marriage is not valid. On the evidence, the Tribunal accepts the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

10. Financial aspects of the relationship

30. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses and any combined future financial commitments or plans.
31. Mrs Lu claimed that she is unemployed because her bridging visa does not allow her to work lawfully in Australia. Mr Byrne claimed he has not worked since 2012 and is now solely dependent on the age pension which he received through Centrelink. The parties claim to live solely off this pension.
32. There is evidence that Mrs Lu and Mr Byrne operate a joint bank account (opened in 2016) with the Bendigo Bank. The Tribunal has had regard to two financial statements (totalling one page each) that cover periods in 2016 for the joint account. The statements list very few transactions and give little insight into the financial aspects of the parties' claimed relationship. Mrs Lu stated that she has access to the joint account. The Tribunal has had regard to what appear to be 10 scanned copies of Bendigo Bank ATM receipts listing withdrawals from a Bendigo Bank account. The Tribunal has also had regard to four scanned Commonwealth Bank ATM receipts.
33. At the hearing the parties told the Tribunal that they transact mainly in cash and often withdraw funds from the joint account over the counter at their local Bendigo Bank branch to cover general household and living expenses. Mr Byrne claimed that he has a personal account into which his pension is paid and from which he deposits money into the joint account. The Tribunal has had regard to three money transfer receipts (on 6 May 2014, 23 September 2014 and 22 February 2016) that record transfers of funds from Mr Byrne to an account in China under Mrs Lu's name. The Tribunal accepts that Mr Byrne has periodically transferred funds to a bank account in China in Mrs Lu's name. Mrs Lu claimed that she owns a property in China in her name, to which both parties contribute financially.
34. There is limited evidence before the Tribunal that Mrs Lu pools, shares or otherwise contributes any financial resources within the relationship. There is no other evidence before the Tribunal of any joint liabilities, joint ownership of major assets, or legal obligations owed by the parties in respect of each other. The Tribunal notes that Mrs Lu claims to be solely financially dependent on Mr Byrne and that Mr Byrne has a fixed and limited income which is comprised solely of his age Centrelink pension. The Tribunal therefore is mindful that this may limit the capacity of the couple to demonstrate financial interdependence.
35. The Tribunal places little weight on the financial aspects of the relationship.

11. *Nature of the household*

36. The Tribunal has considered the nature of the household including any joint responsibility for the care and support of children, living arrangements of the parties and the sharing of the responsibility for housework.
37. The parties claim to have lived together since 2002 in China, approximately six months after meeting in the restaurant in which Mrs Lu worked as a waitress. After Mrs Lu's last arrival in Australia in October 2014 the parties claimed to have lived together first at Mr Byrne's sister's house and then, from April 2016, in a boarding/share house in Dandenong where they claim to still reside together. The Tribunal has viewed copies of two residential tenancy agreements for this property (the first dated 30 March 2016 and the second dated 2 April 2017) that list both Mrs Lu and Mr Byrne as tenants. The Tribunal notes that when questioned about their current living arrangements, both parties stated that they share the property with the landlord and two other tenants although neither Mrs Lu nor Mr Byrne could name the other tenants. When asked why she could not name the people with whom she lived, Mrs Lu stated that the tenants had not lived in the house long and that she hadn't got to know them yet.
38. With respect to the sharing of the responsibility for housework the parties claimed that Mrs Lu does a greater share of the cooking and that both parties are responsible for grocery shopping. General household cleaning chores are also shared by their landlord who lives at the property. The Tribunal accepts that the parties generally divide and share the responsibility for housework. Given that the parties live together, this is unsurprising.
39. There is no evidence before the Tribunal that the couple have shared responsibility for the care and support of children. This is unsurprising because the couple do not claim to have any children together.
40. The Tribunal accepts Mrs Lu's claim that she cohabitates with Mr Byrne at the stated Dandenong address and has done so since 2016. The Tribunal also accepts, on the basis of the consistent oral evidence provided at the hearing, that the parties cohabited together for an extended period of many years between 2003 and 2013 in China.
41. The Tribunal gives some weight to this aspect of the relationship.

12. *Social aspects of the relationship*

42. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
43. With respect to whether the parties plan and undertake joint social activities, the Tribunal has had regard to a number of photos submitted as evidence of the couple in social settings. The Tribunal notes that many of the photos clearly date back a number of years and depict the couple at various intervals of their life together in social and other settings. The photos appear authentic and uncontrived. The Tribunal accepts that the parties have known each other for an extended period of time. The Tribunal accepts that the parties have planned and undertaken various social activities together over an extended period and that they have represented themselves to others as being in a relationship over many years.
44. A number of statements have been submitted to the Tribunal. The Tribunal accepts that the authors of these statements believe the relationship to be a genuine one. The Tribunal

accepts that the parties plan and undertake social activities together and that they represent themselves to others as being in a relationship.

45. The Tribunal questioned the parties at the hearing about their social interactions and activities as a couple. The Tribunal notes that Mrs Lu could only provide limited details of her social life with her husband. When pressed by the Tribunal to name any social or leisure activities that she engaged in with her husband, Mrs Lu initially struggled to give an answer and gave examples of things they did separately (Mr Byrne liked to read and watch the news and she tended to a vegetable garden). She eventually offered that they walked together and went on drives. The Tribunal notes that when Mr Byrne was asked similar questions about social aspects of the relationship his answers were similarly limited but the activities he named were consistent with Mrs Lu's evidence. Mr Byrne stated that they did not go spending money and claimed that he was restricted in his activity by health issues. The Tribunal accepts that these factors have limited the couple's ability to socialise and engage in leisure activities together.
46. The Tribunal questioned the parties about any travel or holidays they had undertaken together in Australia. Mr Byrne stated that due to their financial situation and his claimed health issues, their ability to travel was restricted. The Tribunal accepts this. The Tribunal notes there is extensive evidence before it (including in the form of boarding passes, travel receipts and flight itineraries in both names) that the parties have undertaken multiple concurrent trips together over an extended number of years, including to Australia from China on several occasions, including in 2006, 2008, 2009, 2011 and 2013. The Tribunal notes that the parties' individual Departmental movement records also corroborate this joint travel. The Tribunal places significant weight on this evidence of concurrent travel together over an extended time period.
47. The Tribunal notes and accepts the candid and credible witness testimony given at the hearing by both of the witnesses: Ms Jennifer Coates (a long-time family friend) and Ms Susan Muir (Mr Byrne's sister). Ms Coates spoke about her knowledge of the couple's relationship, and showed the Tribunal photos she had brought to the hearing of the couple together, some of which dated back many years. She credibly described Mrs Lu's contribution to Mr Byrne's life and family. Ms Muir stated that she first met Mrs Lu over Skype from China in 2001 or 2002. She gave highly credible evidence about Mrs Lu's contribution to the family life in Australia. She spoke of the ways in which Mrs Lu has over time become a valued member of her family, and noted Mrs Lu's close relationship with her grandchildren. She gave credible evidence about various aspects of the couple's relationship, including key dates and events that were consistent with the couple's evidence. Both witnesses' reasons for believing the couple's relationship to be genuine and continuing were credible and well considered. The Tribunal accepts the claims made by the witnesses and places strong weight on them.
48. The Tribunal places strong positive weight on the social aspect of the relationship.

13. The nature of the persons' commitment to each other

49. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
50. The Tribunal has had regard to the duration of the relationship and notes the longevity of it. The Tribunal accepts that the parties met in 2001, moved in together in 2002 and became engaged in 2003. The Tribunal accepts that the couple were legally married in China in September 2005 and have been married to each other for nearly 14 years.

51. The Tribunal questioned both parties about their knowledge of each other. The parties demonstrated some specific knowledge about each other's lives, such as employment histories, living arrangements and family composition. The Tribunal accepts that Mrs Lu knows and has met various members of Mr Byrne's family including his sister. The Tribunal notes that the parties gave vague evidence regarding other aspects of each other's lives, including their shared interests and how they occupy their time together and separately. The Tribunal also notes that although Mrs Lu knew that Mr Byrne had been previously married she knew no details about the relationship. When asked why she did not know more detail of such a significant aspect of her husband's life, she said that it was a private matter and that she had not asked Mr Byrne about it.
52. The Tribunal questioned the parties about their plans for the future. Mrs Lu's response was that she would look for a job but could offer no further explanation of any future planning the parties had undertaken. Mr Byrne's answer to the same question was similarly vague. He stated that Mrs Lu would look for a job and when asked what he would do if the application failed, he said he would likely return to China with her but was unsure about what he would do for income.
53. As mentioned above, the Tribunal has significant concerns about the inconsistencies in evidence initially provided by the parties in relation to Mrs Lu's travel history to Australia in 2013-14 and the explanations provided regarding the extended period of geographic separation the parties underwent during this period. However, having carefully considered all of the evidence of the relationship cumulatively and collectively, including issues related to the credibility of Mrs Lu, the Tribunal is satisfied that the weight of evidence does support a finding that the parties are in a genuine and continuing relationship.

14. Conclusion on s.5F(2) requirements

54. On the basis of the above the Tribunal is satisfied the parties are married to each other under a marriage which is valid for the purposes of the Act, and therefore at the time of application and time of decision the parties meet s.5F(2)(a).
55. The Tribunal is satisfied that at the time of application and the time of decision Mrs Lu and Mr Byrne have a mutual commitment to a shared life as married couple to the exclusion of all others. The Tribunal is satisfied that the relationship is genuine and continuing. The couple therefore meet the requirements of s.5F(2)(b) and s.5F(2)(c) for a married relationship.
56. Additionally, the Tribunal is satisfied that at the time of application and time of decision Mrs Lu and Mr Byrne live together. Accordingly, the couple meets the requirements of s.5F(2)(d) for a married relationship.
57. For these reasons the Tribunal finds that at the time of application and time of decision Mrs Lu and Mr Byrne are in a married relationship within the meaning of s.5F(2) and therefore satisfy the definition of 'spouse' contained in s.5F of the Act.
58. The Tribunal is satisfied that at the time of application, and time of decision, Mrs Lu was the spouse of a person who is an Australian citizen, and that Mrs Lu was sponsored by that person. The Tribunal finds that there is no evidence before it which indicates that Mr Byrne was prohibited from being a sponsoring partner under cl.820.211(2B).
59. Accordingly Mrs Lu meets the requirements of cl.820.211(2)(a) and (c).
60. Based on the Department's movement records, the Tribunal also finds that at the time of application Mrs Lu was the holder of a substantive visa, and therefore cl.820.211(2)(d) does not apply.

61. Given these findings the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship. Therefore Mrs Lu meets cl.820.211 and cl.820.221(1).
62. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

63. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that Mrs Lu meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211 of Schedule 2 to the Regulations; and
 - cl.820.221(1) of Schedule 2 to the Regulations

Scott Clarey
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).